No. 16-3737

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DHSC, LLC d/b/a AFFINITY MEDICAL CENTER,

Plaintiff/Appellant,

v.

CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES ORGANIZING COMMITTEE (C.N.A./NNOC), AFL-CIO,

Defendant/Appellee.

Appeal from the United States District Court for the Northern District of Ohio, No. 5:13-cv-1770
The Honorable Benita Y. Pearson, Judge Presiding.

BRIEF OF PLAINTIFF/APPELLANT DHSC, LLC d/b/a AFFINITY MEDICAL CENTER

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****ORAL ARGUMENT REQUESTED****

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Fed. R. App. P. 26.1 and Sixth Cir. R. 26.1, Plaintiff/Appellant DHSC, LLC, d/b/a Affinity Medical Center makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation?

   DHSC, LLC d/b/a Affinity Medical Center is a Delaware company with its principal place of business in Ohio. All membership interests in DHSC, LLC are owned by Massillon Community Health Systems, LLC, a Delaware holding company. Both are indirect subsidiaries of Quorum Health Corporation, a publicly-traded company.

2. Is there a publicly owned corporation, not a party to the appeal, which has a financial interest in the outcome?

   No

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Affinity respectfully requests oral argument in this matter. This appeal is before the Court as a result of the district court's opinion and judgment dismissing this action for lack of subject matter jurisdiction. Affinity believes that oral argument would be beneficial to the Court in assessing the propriety of the district court's decision dismissing this action, despite correctly concluding that Affinity had stated a claim upon which relief can be granted under the parties' implied-in-fact contract (collective bargaining agreement).

JURISDICTIONAL STATEMENT

The district court's jurisdiction is premised upon federal jurisdiction, namely 28 U.S.C. §§ 1331, 2201, and 1651. This action was brought pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

This Court has jurisdiction over this appeal arising out of a final judgment of the Federal District Court for the Northern District of Ohio. *See* 28 U.S.C. § 1291. Specifically, the final judgment was entered on May 31, 2016. (Judgment, R. 75). The notice of appeal was timely filed on June 29, 2016. (Notice of Appeal, R. 76). The notice of appeal was from a final judgment disposing of all claims as to all parties based on the district court's conclusion that it lacked subject matter jurisdiction. *Id.*

ISSUE PRESENTED

1. Did the district court err in dismissing this action for lack of subject matter jurisdiction on the mistaken belief that the action presents a primarily representational dispute over which the National Labor Relations Board has exclusive jurisdiction, despite the fact that the dispute involves breaches of an implied-in-fact

contract between Plaintiff and Defendant, which provides the district court with concurrent jurisdiction under § 301 of the Labor Management Relations Act ("LMRA")?

STATEMENT OF THE CASE

This appeal arises out of the district court's Order granting a motion to dismiss for lack of subject matter jurisdiction. The district court's decision is erroneous and its judgment should be reversed.

On August 13, 2013, Plaintiff/Appellant, DHSC, LLC d/b/a Affinity Medical Center ("Affinity") filed its Complaint for Breach of Contract, Specific Performance, and Declaratory Judgment and for a Speedy Hearing under Federal Rule of Civil Procedure 57 (Complaint, R. 1). On October 14, 2013, Defendant/Appellee, the California Nurses Association/National Nurses Organizing Committee, AFL-CIO ("CNA") filed its Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) . (Motion to Dismiss, R. 12). Following discussions with the district court, Affinity filed its First Amended Complaint. (First Amended Complaint ("FAC"), R. 18). As no discovery has occurred, the salient facts governing this case are set forth in the FAC.

In the FAC, Affinity alleges that it has a valid implied-in-fact collective bargaining agreement ("Implied Agreement") with the CNA, which provides that both Affinity and CNA must submit any unresolved disputes about compliance with, or construction of, the Implied Agreement to binding arbitration. *Id.* at Page ID## 198, ¶ 3; 201, ¶¶ 18-20. More specifically, in early 2012, the parties began negotiating a framework for an agreement governing their relationship during CNA's efforts to organize the registered nurses employed by Affinity, as well as the parties' conduct during any collective bargaining negotiations that might follow. *Id.*at Page ID# 200, ¶ 14. Attached to the FAC was the parties' Labor Relations Agreement ("LRA", R. 18-1) and an Election Procedure Agreement ("EPA", R. 18-2). Both documents provide terms for arbitration of disputes. The LRA provides that the Parties agree to submit "… any unresolved disputes about … [the LRA] to final and binding arbitration." (LRA, R. 18-1 at Page ID# 223. The EPA provides that if the parties cannot resolve a dispute, "either party may … submit [an] unresolved dispute … for final and binding resolution" and the EPA actually identifies the agreed upon arbitrator, Ralph Berger. (EPA, R. 18-2, Page ID# 249). The EPA makes clear that the arbitrator was

selected pursuant to the terms of the LRA, and specifically references that agreement. *Id.* The EPA even delineates different deadlines and requirements for the Arbitrator depending on whether the issue occurred pre or post election. *Id.*

Thereafter, the parties actually conducted themselves in accordance with the aforementioned Implied Agreement. For example, on July 3, 2012, Jane Lawhon, CNA's counsel, sent an email regarding an intent to organize, wherein she wrote that CNA was providing Affinity with written notice of its intent to organize Affinity's registered nurses "[p]ursuant to Paragraph 1 of the Election Procedure Agreement." *Id.* at R. 18-3, Page ID# 251. In the months that followed, both parties performed actions consistent with the terms detailed in the LRA and EPA, including: jointly issuing a notice to Affinity's employees about CNA's organizing efforts and the upcoming union election; jointly conducting training sessions about the organizing process for supervisors, managers, and union organizers; and exchanging and pre-screening the other party's literature about the organizing effort. *Id.* at R. 18, Page ID # 203, ¶ 24. Affinity provided CNA organizers with enhanced access to company break rooms, conference rooms, bulletin

boards, and the cafeteria. *Id.* Affinity granted unpaid leave to Affinity employees who were facilitating CNA's organizing activities. *Id.* Moreover, both parties also followed the dispute resolution procedures detailed in the LRA and EPA to settle nearly 30 disputes. *Id.*

Further in compliance with the Implied Agreement, on August 29, 2012, the National Labor Relations Board ("NLRB" or the "Board") conducted a secret ballot election among the registered nurses employed by Affinity. *Id.* at Page ID# 204, ¶ 25. Affinity had objections to the election. Pursuant to the Implied Agreement, Affinity sought CNA's cooperation in notifying the Board to withhold resolution of objections and various challenges consistent with the parties' Implied Agreement. *Id.* at Page ID## 204-05, ¶ 26.

Notwithstanding the relationship of the parties, one governed by the Implied Agreement, as early as September 13, 2012, CNA was in breach. Specifically, CNA refused to join Affinity in requesting that the NLRB hold resolution of its unfair labor practices challenges in abeyance or submit its challenges to arbitration. Instead, CNA actively participated in the NLRB's resolution of challenges, in derogation of the parties' Implied Agreement. *Id.* at Page ID## 205-206, ¶¶ 31-35.

Months after the election and the various breaches, on October 5, 2012, the NLRB certified the CNA as the exclusive collective bargaining representative of the registered nurses employed by Affinity. *Id.* at Page ID# 199, ¶ 8.

While the above breaches related to the election proceedings, Affinity alleged additional breaches. Specifically, the breaches set forth in Affinity's FAC also related to post-election access and communication provisions set forth in the Implied Agreement. *Id.* at Page ID## 205, ¶ 28; 206, ¶ 34.

The CNA moved to dismiss the FAC pursuant to Federal Rule 12(b)(6), making multiple arguments in support. On August 31, 2015, the district court denied CNA's second motion to dismiss, finding that Affinity had pled proper claims. (Opinion and Order, R. 22). In so ruling, the court found that Affinity had pled an implied-in-fact contract between the parties, which gave rise to a legal claim under Section 301 of the LMRA. *Id.* at Page ID# 344.

Nearly two and one half (2.5) years after this action was filed, on December 4, 2015, the CNA filed its motion to dismiss for lack of subject matter jurisdiction, the issue before this Court on appeal. (Motion, R.

45). Following briefing of the matter, the district court granted CNA's motion, and dismissed the action for lack of jurisdiction. (Opinion and Order, R. 74). The district court entered its final judgment on May 31, 2016. (Judgment, R. 75). This appeal followed.

SUMMARY OF THE ARGUMENT

The district court erred in dismissing this case for lack of jurisdiction. The CNA acknowledges that despite the NLRB having jurisdiction in certain cases, federal courts retain jurisdiction under the Labor Management Relations Act ("LMRA") and specifically over claims brought under Section 301 relating to the interpretation and application of labor contracts, as present in this case. Indeed, federal courts retain jurisdiction even in circumstances where the NLRB also asserted jurisdiction, as occurred in this case. The question is whether the dispute is "primarily representational." In this case, as clearly pled by Affinity, the dispute is not primarily representational because it involves a dispute that arose *prior to* any election certification by the NLRB and involves a dispute regarding post-election conduct, such as access to the facility at issue. These are not issues exclusive to the NLRB's jurisdiction.

Instead, the dispute at issue in this litigation involves the parties' contractual duty to submit any disputes about compliance with, or construction of, the contract to binding arbitration, to cooperate with one another in doing so, and to request the NLRB hold its resolution of any such dispute in abeyance. The CNA's breaches of these provisions all occurred *before* October 5, 2012, when the NLRB certified the August 29, 2012 election, and thus, present issues that fall into the permissible overlap of federal court jurisdiction with that of NLRB jurisdiction. Further, this dispute involves allegations the CNA breached the parties Implied Agreement regarding post-election access, again an issue not within the exclusive purview of the NLRB. The district court's holding to the contrary is erroneous.

Finally, the district court's decision is contrary to the very purpose of § 301, which was to *expand* the available forums for bringing disputes arising out of collective bargaining agreements. The district court's decision actually serves to reward a party who enters into a contract and then knowingly breaches it, only then to cloak itself under the guise of the Board's purported exercise of jurisdiction. Should the district court's decision stand, it will serve only to chill any attempts between

employers and unions to find harmony and limit costs, and will undermine the bedrock principles of federal labor law. The district court's decision undermines the purposes of § 301 of the LMRA, and it is contrary to well-settled law.

Accordingly, the judgment of the district court should be reversed.

LEGAL ARGUMENT

I. Standard of Review

This Court reviews a district court decision granting dismissal for lack of subject matter jurisdiction *de novo*. *Nihiser v. Ohio E.P.A.*, 269 F.3d 626, 627 (6th Cir. 2001). Section 301(a) of the LMRA empowers district courts to hear "[s]uits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a). As a component of that authority, a district court may "grant . . . specific enforcement of an arbitration clause in a collective-bargaining agreement." *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397, 420 (1976). When reviewing a claim for arbitration, "a court's role is limited to deciding if 'the party seeking arbitration is making a claim which on its face is governed by the contract.'" *Gen. Drivers, Local Union No. 984 v. Malone*

& Hyde, 23 F.3d 1039, 1043 (6th Cir. 1994) (quoting *United Steelworkers v. Am. Mfg. Co.,* 363 U.S. 564, 568 (1960)).

II. The District Court Should Have Exercised Subject-Matter Jurisdiction Pursuant to Section 301 of The LMRA, Which Permits Actions Requiring Interpretation and Application of Collective Bargaining Agreements, Even if the NLRB Could Have Exercised Concurrent Jurisdiction

Generally, if a matter falls within the purview of the NLRB, it has exclusive jurisdiction based on its "exclusive competence" of the subject matter. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). However, Section 301(a) of the LMRA carves out an exception to the NLRB's exclusive jurisdiction and "empowers district courts to hear '[s]uits for violation of contracts between an employer and a labor organization.'" *Int'l Brotherhood of Electrical Workers, Local 71 v. Trafftech, Inc.*, 461 F.3d 690, 693 (6th Cir. 2006) (quoting 29 U.S.C. § 185(a)); *see also, Vaca v. Sipes*, 386 U.S. 171, 179 (1967). To this end, "if a labor dispute is contractual, *Garmon* preemption does not apply; instead, the aggrieved party can sue on the contract in federal court." *District No. 1, Pacific Coast District, Marine Engineers' Beneficial Ass'n, AFL-CIO v. Liberty Maritime Corp.*, 815 F.3d 834, 840 (D.C. Cir 2016);

DiPonio Const. Co., Inc. v. Int'l Union of Bricklayers and Allied Craftworkers, Local 9, 687 F.3d 744, 749 (6th Cir. 2012).

Because some claims are both contractual and representational, "the NLRB and federal courts may have concurrent jurisdiction over some disputes." *DiPonio*, 687 F.3d at 749. For example, "the Supreme Court has held that even if the contract dispute involves a representational question, and 'even though an alternative remedy before the Board . . . is available,' under Section 301(a) of the LMRA, federal courts have jurisdiction to enforce an arbitration clause." *Paper, Allied Indus., Chem. & Energy Workers Int'l Union v. Air Prods. & Chems., Inc.*, 300 F.3d 667, 673 (6th Cir. 2002) (citing *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 268 (1964)). Accordingly, this Court has drawn a dichotomy between disputes that implicate the NLRB's exclusive jurisdiction and disputes that implicate the concurrent jurisdiction of the federal courts under Section 301(a): if a dispute is "primarily representational," the NLRB has exclusive jurisdiction; if a dispute is "collaterally representational," the federal courts have concurrent jurisdiction. *Trafftech, Inc.*, 461 F.3d at 694-95.

This Court has identified two scenarios where a dispute is treated as "primarily representational" and, therefore, outside of the jurisdiction of the federal courts. First, a dispute is primarily representational "'where the [NLRB] has already exercised jurisdiction over a matter and is either considering it or has already decided the matter[.]'" *DiPonio*, 687 F.3d at 750 (quoting *Trafftech*, 461 F.3d at 695) (brackets in original). Second, a dispute is primarily representational "'where the issue is an initial decision in the representation area.'" *Id.* (quoting *Trafftech*, 461 F.3d at 695) (internal quotation marks omitted).

A. The District Court Erred in Concluding that Affinity's Breach of Contract Action was "Primarily Representational" Simply Because NLRB Proceedings Occurred.

The district court erroneously determined that Affinity's breach of contract action — arising out of CNA's breach of the parties' Implied Agreement — is "primarily representational." Specifically, the district court erred in holding that, "the case at bar raises the precise issues previously addressed by the Board: whether the election challenges and objections and, ultimately, the Union's representation rights and Affinity's bargaining obligations, will be determined by an arbitrator or

by the Board." (Opinion, R. 74, Page ID ##1151—52). The district court also erred in concluding that Affinity's claims sought to undo the NLRB's certification of the election. *Id.* at Page ID #1153. Affinity's complaint asserted breaches of the parties' Implied Agreement that occurred *before* the NLRB certified the election and arise under the parties' contract. Affinity also asserted breaches of the Implied Agreement regarding post-election access to the facility and conduct in collective bargaining negotiations. Simply put, the district court improvidently dismissed Affinity's case for lack of subject-matter jurisdiction and deprived Affinity of a proper forum to have its contractual claims decided.

1. Affinity's claims involve interpretation of the parties' contractual agreements and, therefore, do not arise out of a "primarily representational" dispute.

The district court erred in characterizing Affinity's claims as "primarily representational." Affinity's claims arise out of the CNA's breaches of the Implied Agreement. The FAC alleges that the CNA failed to comply with the Implied Agreement that required the CNA to submit any disputes about compliance with, or construction of, the contract to binding arbitration, to cooperate with one another in doing

so, and to request the NLRB hold its resolution of any such dispute in abeyance. Affinity's FAC alleges that these breaches occurred *before* the NLRB certified the election and relate to resolution of challenges by the parties and objections to the election, as well as post-election breaches regarding access to Affinity's facility. These are contractual issues giving rise to federal court jurisdiction pursuant to Section 301(a) of the LMRA.

The Supreme Court addressed whether federal courts have jurisdiction under section 301 to compel arbitration of a dispute in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964). In *Carey*, two unions (IUE and Westinghouse) fought over which union was the appropriate bargaining representative for a group of employees. *Id.* at 263. The collective bargaining agreement contained a grievance procedure for the use of arbitration "in case of unresolved disputes, including those involving the 'interpretation, application or claimed violation' of the agreement." *Id.* at 262. IUE filed a grievance asserting that certain employees were improperly performing production and maintenance work. *Id.* Westinghouse refused to arbitrate on the grounds that the controversy presented a representational matter for

the NLRB. *Id.* IEU thus filed a lawsuit that made its way through the state courts of New York. Ultimately, the New York Court of Appeals held that "the matter was within the exclusive jurisdiction of the Board since it involved a definition of bargaining units." *Id.* at 263.

The Supreme Court reversed the New York Court of Appeals' decision on certiorari review holding that the trial court had jurisdiction to hear the dispute. In so doing, the Court explained, in dicta:

> If this is truly a representation case, either IUE or Westinghouse can move to have the certificate clarified. But the existence of a remedy before the Board for an unfair labor practice does not bar individual employees from seeking damages for breach of a collective bargaining agreement in a state court, as we held in *Smith v. Evening News Assn.*, 371 U.S. 195. We think the same policy considerations are applicable here; and that a suit either in the federal courts, as provided by § 301(a) of the [LMRA] . . . , or before such state tribunals as authorized to act . . . is proper, even though an alternative remedy before the Board is available, which, if invoked by the employer, will protect him.

Id. at 268 (internal citations omitted).

Since the Court's decision in *Carey*, many courts have addressed Section 301 jurisdictional disputes seeking to compel arbitration under a collective bargaining agreement. This Court's decision in *Trafftech* is instructive. In *Trafftech*, the employer, a road/highway construction

contractor, signed a collective bargaining agreement with one union (Laborers) for a pool of workers. 461 F.3d at 691. From Trafftech's perspective, the Laborers did not provide enough workers, so Trafftech signed a separate collective bargaining agreement some years later with the IBEW. *Id.* The scope of work governed by the two collective bargaining agreements overlapped in the "electrical related traffic signal and/or highway street lighting work." *Id.* at 692. The IBEW filed a number of grievances stemming from Trafftech's assignment of some of the defined work to the Laborers. Trafftech refused to process the grievances, which compelled the IBEW to file a Section 301 action. Trafftech, on the other hand, filed a representation petition with the NLRB, arguing that the grievances filed by the IBEW should be construed as a claim by the IBEW that it should represent all of Trafftech's workers performing signal or street lighting work. *Id.*

This Court affirmed the district court's determination that it had subject-matter jurisdiction to hear the Section 301 dispute. In so doing, this Court explained why the Section 301 case involved a dispute that was contractual as opposed to "primarily representational":

> Like the district court, we believe that this arbitration claim "is governed by the contract." Local 71 filed 11 grievances

> with the union. In doing so, it identified the section of the collective bargaining agreement that each grievance violated, and when the company refused to address the grievances, the union invoked its rights under Article I, §§ 5-8 of the collective bargaining agreement. Those sections say that if the parties cannot resolve grievances on their own, "the parties shall jointly request Federal Mediation & Conciliation Service to . . . hear the grievances. Trafftech refused to arbitrate, and Local 71 therefore permissibly filed this claim under § 301(a) seeking an order compelling Trafftech "to participate in the arbitration procedure of these grievances."

Id. at 693 (internal citations to record omitted).

This Court also explained that "Local 71 permissibly characterized its action as a dispute arising under the collective bargaining agreement." *Id.* at 695. Although Trafftech's filings in the NLRB action also raised representational issues, the Court reasoned that the NLRB action "did not convert Local 71's complaint into one that is primarily representational in nature." *Id.* This is because it was not necessary to first resolve the representational dispute to determine whether there was a violation of the collective bargaining agreement. *Id.* at 695-96.

The same is true in this case. Like Local 71 in the *Trafftech* case, Affinity brought this action after the CNA refused to abide by the parties' contractual duty to submit multiple disputes about compliance with, and construction of, the Implied Agreement to binding arbitration.

The CNA refused to submit disputes about the election to binding arbitration, and it refused to send disputes about post-election facility access and conduct of the collective bargaining negotiations to arbitration. The parties' Implied Agreement governs these disputes because, like *Trafftech*, it is unnecessary to resolve any representational dispute to determine whether the CNA violated the parties' Implied Agreement—a contractual issue.

This Court also determined that a dispute was not "primarily representational" in *International Union of Operating Engineers, Local 18 v. Laborers' International Union of North America*, 580 F. App'x 344 (6th Cir. 2014). In *Laborers' International*, one union sued another union claiming that the second union violated a memorandum of understanding between the two unions as to which union had the right to do particular jobs at multiple construction sites. *Id.* at 345. The Laborers' International Union of North America argued that the federal court lacked subject matter jurisdiction to hear the Section 301 dispute because it was "primarily representational." *Id.* at 345-46. This Court disagreed, stating that the case presented "primarily contractual issues

and thus belongs in federal court . . . [because] [t]he Engineers press only their rights under the Memorandum." *Id.* at 346.

Here, like *Laborers' International*, Affinity only presses its rights under the parties' Implied Agreement. As explained, these rights involve the process the parties agreed to abide by to resolve their disputes under the Implied Agreement. Enforcement of the Implied Agreement's terms is, therefore, not primarily representational. Rather, like *Labors' International*, Affinity is only seeking to enforce its contractual rights through this Section 301 case.

More recently, the United States Court of Appeals for the District of Columbia Circuit rejected a party's attempt to characterize a contractual dispute as "primarily representational," in *District No. 1, Pacific Coast District, Marine Engineers' Beneficial Association, AFL-CIO (MEBA) v. Liberty Maritime Corp. (Liberty)*, 815 F.3d 834 (D.C. Cir. 2016). In *Liberty Maritime*, Liberty and MEBA were parties to successive collective bargaining agreements "under which Liberty exclusively employed MEBA members as supervisory personnel on several of its bulk-carrier ships." *Id.* at 836. Liberty replaced its MEBA member-employees with members of a rival union, asserting it had the

right to hire other supervisors because the CBA, as amended by a memorandum of understanding, had expired. *Id.* The expiration of the CBA was contingent on the parties reaching impasse before the stated expiration date. The CBA contained a provision that the parties agreed to arbitrate "all disputes relating to the interpretation or performance of" the CBA. *Id.*

MEBA submitted a formal grievance to Liberty using the parties' grievance-and-arbitration procedure set forth in the CBA, challenging Liberty's replacement of MEBA. *Id.* at 838. When Liberty refused to arbitrate, MEBA filed a Section 301 lawsuit in federal court claiming that Liberty breached the parties' collective bargaining agreement. *Id.* at 836. The central issue in the lawsuit was whether the CBA had expired, which would have allowed Liberty to hire supervisors from another union. Liberty, however, couched the dispute as representational, asserting the MEBA sought to replace a rival union. *Id.* at 842.

The district court in *Liberty Maritime* determined that the parties' CBA required the parties to submit the question of whether the agreement had expired to arbitration. *Id.* at 837. Liberty appealed the

district court's decision and, on appeal, Liberty argued that the district court lacked subject-matter jurisdiction over MEBA's action because it was "primarily representational." *Id.* The Court of Appeals disagreed and explained why MEBA's lawsuit was "primarily contractual" as opposed to "primarily representational":

> [R]esolving MEBA's suit requires deciding plainly contractual matters—what constitutes "impasse" and whether Liberty's conduct breached the parties' agreement. The decision may ultimately have a representational effect in that MEBA could, under the terms of the contract, be reinstated as the representative of Liberty's officers and engineers. But that effect results from the enforcement of the CBA, not from the resolution of any representational question.
>
> * * * *
>
> . . . [T]he dispute boils down to a contractual one—whether the New Agreement remained in effect as of 12:01 a.m. on October 1 and whether Liberty violated it. Accordingly, we conclude that the district court properly exercised its jurisdiction under section 301 of the LMRA.

Id. at 843.[1]

The issues raised in Affinity's FAC are virtually identical to the issues raised by MEBA in *Liberty Maritime*—namely, whether the CNA

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[1] The DC Circuit also determined that MEBA's lawsuit did not fit the two categories of "primarily representational" disputes—that the NLRB had already decided the issue and that the issue was an "initial" representational question. *Id.* at 843. Affinity addresses these issues below.

breached the Implied Agreement by refusing to submit unresolved disputes about compliance with, or construction of, the Implied Agreement to binding arbitration. As the DC Circuit aptly explained in *Liberty Maritime*, such a dispute "boils down to a contractual one," and the district court should have exercised its jurisdiction under section 301 of the LMRA. Indeed, even if the decision on Affinity's Section 301 claims will ultimately have a representational effect, "that effect results from the enforcement of the CBA, not from the resolution of any representational question." *Liberty Maritime*, 815 F.3d at 843. Simply put, Affinity's Section 301 claims raise contractual issues that, even if tangentially related to representational issues, are within the federal courts' jurisdiction. As such, Affinity is entitled to seek damages for the CNA's breach of the Implied Agreement. *Carey*, 375 U.S. at 268.

To this end, the district court simply erred when it stated that, "the case at bar raises the precise issues previously addressed by the Board: whether the election challenges and objections and, ultimately the Union's representation rights and Affinity's bargaining obligations, will be determined by an arbitrator or by the Board. The Board definitively decided that issue when it certified the Union. . . ."

(Opinion, R. 74, Page ID## 1151—52). That is *not* what Affinity's case seeks. Affinity's federal court action seeks a remedy for the CNA's failure to comply with the Implied Agreement's arbitration procedures—a breach of *contract*. As the Supreme Court has noted, "an arbitrator . . . is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies." *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). In *Local 120, Int'l Molders & Allied Workers Union, AFL-CIO v. Brooks Foundry, Inc.,* 892 F.2d 1283 (6th Cir. 1990), this Court upheld an arbitrator's award of monetary damages for the company's breach of the parties' agreement where the agreement did not specifically provide for or prohibit such an award. *See also, Lynchburg Foundry Co. v. United Tellworkers of Am., Local 2556*, 404 F.2d 259, 261 (4th Cir. 1968) (in the absence of language evidencing a clear intent to deny the arbitrator any latitude of judgment regarding the appropriate form of a remedy, the arbitrator and not a court properly determines this issue). Here, consistent with the long recognized right of arbitrators to formulate remedies, the parties agreed that an arbitrator would have the power to issue any and

all remedies he/she deemed just and proper, including compensatory damages, equitable relief, and attorney fees and costs. (FAC and LRA, R. 18-1 at Page ID# 224).

The district court's decision misunderstands the fundamental difference between a Section 301 claim and one that is purely representational. This Court should reverse the district court's decision and remand this case for further proceedings.

2. The NLRB's concurrent proceedings and certification of the election did not strip the district court of subject-matter jurisdiction over Affinity's Section 301 action

The NLRB's ultimate exercise of jurisdiction is of no import because it *followed* the CNA's breach of the CBA. To permit the district court's decision to stand rewards the CNA for breaching the contract that ultimately led to the NLRB proceeding. In other words, to allow a union to blatantly violate its contractual agreements with an employer but then strip federal courts of subject-matter jurisdiction to hear such disputes (if NLRB proceedings are subsequently initiated) would deprive an employer of a forum to bring its contract claims and is not in accord with this Court's case law interpreting Section 301.

In *Trafftech*, this Court cited the Eighth Circuit's decision in *International Brotherhood of Electrical Workers v. Iowa Electric Light and Power Company*, 668 F.2d 413 (8th Cir. 1982), for the proposition that a dispute is primarily representational "where the Board has already exercised jurisdiction over a matter and is either considering it or has already decided the matter." 461 F.3d 695. The Eighth Circuit's decision in *Iowa Electric* highlights why the NLRB's exercise of jurisdiction in this case did not deprive the district court of subject-matter jurisdiction over Affinity's Section 301 claims.

In *Iowa Electric*, the union sought to expand its representation of employees at a power plant through an "accretion" procedure in the collective bargaining agreement. 668 F.2d at 415. The union petitioned the NLRB for accretion. *Id.* The employer argued that the identified workers were "supervisory" and thus ineligible for union representation, but ultimately lost. *Id.* The NLRB held an election and certified the union. *Id.* The employer refused to negotiate with the union, and the union ultimately brought a Section 301 action to enforce the duty to bargain. *Id.*

Although the district court found it had jurisdiction, the Eighth Circuit disagreed, framing the issue as: whether the federal courts had jurisdiction under Section 301 over matters which may also constitute unfair labor practices. *Id.* at 416. Noting that the underlying collective bargaining agreement did *not* compel arbitration, the court found no compelling grounds to exercise jurisdiction:

> . . . *Carey* has been consistently interpreted to support district court jurisdiction under section 301 of the LMRA over suits to compel arbitration of a representational dispute *where the parties have agreed under the collective bargaining agreement to arbitrate such matters*. . . In the instant case, the union did not bring suit under section 301 for breach of the contract arbitration clause. . .
>
> Thus, *Carey*, unlike the present case, can truly be viewed as arising out of a breach of a contract provision concerning arbitration. The present case, on the other hand, really is a suit to obtain review of an NLRB factual finding on a representational issue despite the fact that Congress has established an orderly review procedure under section 10 of the Act. We believe the appropriate line between those cases where the district court has jurisdiction under section 301 and those in which it does not is to be determined by examining the major issues to be decided as to whether they can be characterized as primarily representational or primary contractual.

Id. at 419 (internal citations omitted) (emphasis added).

Unlike the *Iowa Electric* case—which formed the basis of *Trafftech*'s conclusion that a dispute is "primarily representational" if

the NLRB has already exercised jurisdiction—the issue in this case *is* whether the Implied Agreement compels arbitration of election-related disputes, whether the CNA breached its contractual obligations, and the proper remedy for such breach. These are contractual issues related to the parties' Implied Agreement, regardless of whether the NLRB has exercised jurisdiction over the dispute and has addressed representational issues. Unlike *Iowa Electric*, this case is *not* "really . . . a suit to obtain review of an NLRB factual finding on a representational issue. . . ." *Iowa Electric*, 668 F.2d at 419. This is exactly the type of case that *Iowa Electric* reasoned would permit federal court jurisdiction pursuant to Section 301: a suit "to compel arbitration of a representational dispute *where the parties have agreed under the collective bargaining agreement to arbitrate such matters*. . . ." *Id.* (emphasis added).

In support of its position that the district court lacked subject-matter jurisdiction over Affinity's claims, the CNA relied on *International Brotherhood of Boilermakers v. Olympic Plating Indus., Inc.*, 870 F.2d 1085 (6th Cir. 1989), a Sixth Circuit case pre-dating *Trafftech*. The district court apparently agreed with the CNA's

argument because it cited *Olympic Plating* as being "an analogous situation." (Opinion and Order, R. 74, Page ID# 1152). But the ruling in *Olympic Plating* supports Affinity's position that the district court should have exercised subject-matter jurisdiction over Affinity's Section 301 claims.

In *Olympic Plating*, a Local Boilermakers chapter voted to disavow the international union in favor of a competing union. 870 F.2d at 1086. Boilermakers unsuccessfully tried to force a turnover of assets from the Local. *Id.* Boilermakers then sued the Local and the employer under Section 301. *Id.* On a motion to dismiss for lack of subject matter jurisdiction, the trial court dismissed all three claims: a request to enjoin the Local's breach of the Boilermakers' constitution (Count I); a claim for breach of the Boilermakers constitution (Count II); and injunctive relief as to the employer to prevent it from recognizing the competing union as the representative of Olympic's employees (Count III). *Id.* This Court affirmed in part, but held that the federal courts retained jurisdiction over Counts I and II. As to Count III, only, this Court held that, in cases "where the Board's resolution of non-contractual issues could also resolve the controversial breach of contract

claims brought under § 301, the federal courts should decline to exercise jurisdiction." *Id.* at 1089 (citation omitted). This Court explained that, "although Count III of the instant complaint is styled as presenting a 'breach of contract' claim, Count III is virtually identical to the pending unfair labor practice charge before the board." *Id.*

The ruling in *Olympic Plating* may be stated another way: where NLRB proceedings afford the injured party no relief for breach of contract, the jurisdiction of the federal court under Section 301 is *not* disturbed. Otherwise, there would be no forum to bring such claims. That is exactly the situation in this case. Affinity filed this Section 301 action asking the district court to determine whether the CNA breached the Implied Agreement by failing to submit disputes related to the election to arbitration, and if so, the proper remedy for such breach. The parties agreed that certain disputes would go to arbitration and that the parties would jointly request that the NLRB hold resolution of objections and challenges in abeyance pending arbitration. Contrary to this contractual obligation, the CNA pushed the NLRB procedure forward, breached its obligation to submit disputes to arbitration, and breached its obligation to ask the NLRB to hold resolution of those

disputes in abeyance pending arbitration. The NLRB necessarily *cannot* decide these contractual issues after already having exercised jurisdiction *following* the CNA's breach of contract that led to the wrongful exercise of that jurisdiction. Accordingly, Affinity's claims are exactly the types of claims *Olympic Plating* contemplated fall within federal court jurisdiction pursuant to Section 301.

The district court also misplaced its reliance on Affinity's requested relief in the FAC as grounds for determining that the court lacked subject-matter jurisdiction. The district court explained:

> That the § 301 disputes at issue in the case are "primarily representational" is evident from Plaintiff's stated requests for relief: specific performance of the Implied Agreement's terms and conditions, including submission of unresolved disputes to final and binding arbitration; and a declaratory judgment mandating the Parties to submit all unresolved disputes under the Implied Agreement to final and binding arbitration.

(Opinion, R. 74, Page ID# 1151) (internal citations to record omitted). The district court's reasoning is not in line with Sixth Circuit precedent.

This Court rejected identical reasoning in *Equitable Resources, Inc. v. United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. And Serv. Workers Int'l Union, AFL-CIO/CLC*, 621 F.3d 538 (6th Cir. 2010). In *Equitable Resources*, this Court highlighted the fact that

collateral matters involving contractual issues are within the jurisdiction of the federal courts pursuant to Section 301. *Id.* at 550. Where the arbitrator does not need to resolve the representational dispute in order to determine whether there is a violation of the collective bargaining agreement, this suggests the matter is contractual. *Id.* The Court made clear that, "[t]he fact that [an employer] see[k]s potential representation issues in the remedy does not preclude the remedy, and [the employer] may still present such issues to the NLRB." *Id.* at 151 (citing *Trafftech*, 461 F.3d at 694, 697). In other words, that an employer's requested relief may implicate contractual *and* representational issues does not vitiate the federal courts' subject-matter jurisdiction to decide contractual issues that are tangentially related to the representational issues. Here, any representational issues implicated by Affinity's Section 301 claim do not need to be decided in order for the district court to decide whether the CNA breached the parties' Implied Agreement.

Indeed, this Court's decision in *Trafftech* makes clear that the NLRB "does not lose jurisdiction solely because [a federal court] enforce[s] [an] arbitration clause" in a section 301 case. 461 F.3d 697.

Stated differently, unless there is an *actual conflict* with the NLRB's rulings relating to representational issues, the federal courts have jurisdiction in breach of contract actions to determine whether an arbitration clause should be enforced. Affinity's case expressly falls within the jurisdiction of the federal courts pursuant to Section 301.

Not only would a decision affirming the district court's dismissal of Affinity's claims in this case deprive Affinity of a forum to have its contract claims heard, it would also reward the CNA for intentionally breaching its contract. Such a decision would render any similar agreement between a union and employer to arbitrate disputes when the parties reach an impasse void *ab initio* as there would never be any consequences for breaching such agreement. In other words (and according to the CNA), all one must do to avoid the consequences of a breach of contract is to submit a dispute to the NLRB after breaching the contract, thus stripping a federal court of jurisdiction. This is not the law. *See Trafftech*, 461 F.3d at 696-97.

The bottom line is that, "'matters primarily of contract interpretation, which potentially implicate representational issues,' remain within the federal courts' § 301 jurisdiction." *Id.* at 694-95.

This is precisely one of those cases. This Court should reverse the district court's decision dismissing Affinity's claim for lack of subject-matter jurisdiction and remand for further proceedings.

3. Affinity's Section 301 claims do not raise "initial decisions of representation"

In support of its motion to dismiss, the CNA also argued that Affinity's claims fall within the NLRB's exclusive jurisdiction because they raise "initial decisions of representation." The CNA is wrong. The district court committed reversible error in agreeing with the CNA.

Case law does not support the CNA's position that Affinity's claims are "initial decisions of representation." In *Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel*, the union and employer entered into a neutrality agreement governing the organizing campaign and providing for an election not conducted by the NLRB. 996 F.2d 561 (2d Cir. 1993). The neutrality agreement included a provision requiring arbitration of disputes. A dispute arose regarding the union's purported majority support, and the parties arbitrated. The arbitrator ruled in favor of the union, and the employer repudiated the contract. *Id.* at 563. The union sued under Section 301. The district court refused to exercise jurisdiction, indicating the issue was

"primarily representational" and thus within the primary jurisdiction of the NLRB. *Id.* at 564.

The Second Circuit reversed, finding the district court had jurisdiction. First, the court found that Section 301 can be used to enforce a contract that bypasses a Board-conducted election, which the court called "a private representation agreement". *Id.* at 566. Second, the court held that Section 301 is properly invoked to enforce an arbitration clause. *Id.* at 567. With regard to the intersection of Section 301 and the NLRB's primary jurisdiction over representational issues, the court wrote: "Even were a dispute representational in nature, an arbitrator acting pursuant to a contract can make the initial decision on the merits." *Id.* Thus, other courts have recognized that parties may consent to resolution of election-related matters *outside* the scope of the NLRB, which is precisely the nature of the Implied Agreement Affinity seeks to enforce.

Similarly, in *Paper, Allied Indus., Chem. & Energy Workers Int'l Union v. Air Prods. & Chems., Inc*, the union asserted grievances under the collective bargaining agreement and asked the court to enforce the arbitration clause through an action filed under Section 301. 300 F.3d

667 (6th Cir. 2002). The employer responded that the dispute was a representational matter implicating the primary jurisdiction of the NLRB. Because the questions were "undeniably governed by the existing collective bargaining agreement," the court held "[e]ven if th[e] matter does implicate a collateral representational issue, the matter is, first and foremost, a genuine Section 301 contract dispute" that permits the federal courts to retain jurisdiction over the dispute and enforce the arbitration clause. *Id.* at 675-76. Hence, the recognition of duality in a proceeding such as this, where election procedures are part of a contract, and the breach of that contract leads to a Section 301 action, does not compel the conclusion advocated by CNA and adopted by the district court.

The decision of *United Food & Commercial Workers Union, Local 400 v. Shoppers Food Warehouse Corp.*, 35 F.3d 958, 961 (4th Cir. 1994), presents yet another example of a case similar to the one before the Court. In *Shoppers Food*, the union brought an action to compel arbitration and enforce provisions in the parties' collective bargaining agreement. *Id.* at 958. A dispute arose as to whether a new store opened by the employer was covered by the parties' collective

bargaining agreement, and thus including the employees of the new store in the bargaining unit. *Id.* at 959. The union demanded arbitration, the employer refused, and the union filed a Section 301 action in federal court. The district court granted summary judgment for the union and compelled arbitration, despite the fact that the union had also filed an unfair labor practice charge with the NLRB while the motions had been pending. *Id.*

On appeal, the Fourth Circuit affirmed. In relevant part, the court was concerned regarding the impact of the NLRB having asserted jurisdiction *and* adjudicating the case, observing that "[t]he Board's resolution of this statutory question is closely intertwined with the underlying facts and issues in the present controversy." *Id.* at 961. The concern raised by the employer was the potential conflict between an arbitrator's decision and that of the NLRB. However, the court rejected this concern, correctly observing that until an arbitrator actually rules, there is no conflict, and the court cannot assume a conflict would exist. *Id.* at 962. This is consistent with Supreme Court precedent. *Carey*, 375 U.S. 272 ("the possibility of conflict is no barrier to resort to a tribunal other than the Board").

Based on the above precedent and case law, it is clear Affinity's claims are not primarily representational. Affinity contends that the CNA breached the Implied Agreement by failing to work with Affinity in requesting that the NLRB defer resolution of election objections and challenges so those issues could be arbitrated. (FAC, R. 18, Page ID## 205,¶¶ 31-32; 206, ¶ 33) Further, Affinity asserts that the CNA breached the Implied Agreement as it relates to post-election access to the Affinity's facility, and the conduct of collective bargaining negotiations. (*Id.* at Page ID## 206, ¶¶ 34-35; 207, ¶ 43; 208, ¶ 46).

The CNA's argument the NLRB has already resolved the representational issue, and that this case presents a question of initial representation, is wrong. First, any resolution by the NLRB of related matters is not dispositive of the contract issues presented in this case, and does not preclude submitting this matter to arbitration. *Carey*, 375 U.S. 272; *Shoppers Food*, 35 F.3d at 962. Moreover, but-for the CNA's breach of the Implied Agreement, the NLRB may not have made any decision because the contract mandated the parties to jointly request that the NLRB defer resolution pending arbitration, which the CNA refused to do. Second, the issues do not involve an "initial decision in

the representation area" as the *Trafftech* court defined that phrase. The issues involve the agreement of parties to resolve election-related disputes *outside of* the NLRB process (as well as post-election access and the conduct of collective bargaining), and the CNA's refusal to heed its contractual obligations in these respects. Indeed, if the question in *Shoppers Food* of whether the union represented employees at a new store opened by the employer did not fall within the primary jurisdiction of the Board, certainly a dispute over challenges to an election *proceeding* or access to a facility do not preclude the exercise of jurisdiction in federal court.

B. The District Court's Refusal to Exercise Subject-Matter Jurisdiction Over Affinity's Claims is Contrary to Congress' Intent in Enacting Section 301.

The legislative history of Section 301 "makes clear that the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations. . . The [LMRA] represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process." *Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 508 (1962); *Drake*

Bakeries, Inc. v. Local 50, Am. Bakery and Confectionery Workers Int'l, AFL-CIO, 370 U.S. 254, 263 (1962) ("In passing § 301, Congress was interested in the enforcement of collective bargaining contracts since it would 'promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.'") (citing S. Rep. No. 105, 80th Cong., 1st Sess. 17). To this end, "[i]t was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements." *Courtney*, 368 U.S. at 509. To achieve the "preferred method for settling disputes" through a "method agreed upon by the parties," Congress determined that such policy "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *Drake Bakeries*, 368 U.S. at 263 (citation omitted).

The district court's decision in this case undermines Congress' intent in enacting Section 301. Affinity has effectively been deprived of a forum to enforce the parties' contractual agreements relating to the

collective bargaining process. This is exactly the reason Congress enacted Section 301. The district court's decision undermines Congress' intent that vitally important contracts between an employer and union be "given full play." *Id.*

CONCLUSION

For the foregoing reasons, Affinity respectfully requests this Honorable Court REVERSE the judgment of the district court and remand this case for further proceedings.

Dated: November 14, 2016

Respectfully submitted,

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CERTIFICATE OF TYPE-VOLUME COMPLIANCE

I, the undersigned, do hereby certify, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(B), that Plaintiff/Appellant's principal brief, according to the Microsoft Word word-processing program, contains 7,822 words, including all headings, footnotes, and quotations. The undersigned further certifies that pursuant to Federal Rule of Appellate Procedure 32(a)(5)(A), Plaintiff/Appellant's principal brief is prepared using a proportionally spaced font with serifs called Century Schoolbook, and the font is 14-point in the body of the brief and 14-point in footnotes.

Dated: November 14, 2016 /s/ Michael O. Fawaz

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CERTIFICATE OF ELECTRONIC FILING AND CERTIFICATE OF SERVICE

I, Michael O. Fawaz, do hereby certify that on November 14, 2016 I electronically filed a true and correct copy of *Plaintiff/Appellant's Brief on Appeal* with the Clerk of this Court using the CM/ECF system, which sent notification of such filing to all counsel of record, including the following:

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ADDENDUM 1
Designation of Relevant District Court Documents
Pursuant to Sixth Cir. R. 30(g)

DHSC, LLC v. California Nurses Association et.al **Designation of Materials for Appendix**		
Docket No.	**Description of Designated Material**	**Page Range**
1	Complaint	1-20
18	First Amended Complaint	198-253
22	Opinion and Order Upholding First Amended Complaint	338-348
45	Motion to Dismiss for Lack of Jurisdiction	475-690
54	Response to Motion to Dismiss for Lack of Jurisdiction	931-946
61	Reply in Support of Motion to Dismiss for Lack of Jurisdiction	979-1048
63	Motion and Memorandum of Amicus Curiae in Support of Motion to Dismiss	1053-1055
69	Response to Motion and Memorandum of Amicus Curiae as to Motion to Dismiss	1103-1113
72	Supplemental Response to Motion to Dismiss	1135-1137
73	Supplemental Reply to Motion to Dismiss	1138-1141
74	Opinion and Order Dismissing Action for Lack of Jurisdiction	1142-1154

75	Judgement	1155-1155
76	Notice of Appeal	1156-1158